

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LARRY D. LEE,	§
	§
Defendant Below-	§ No. 332, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 1007019141
Plaintiff Below-	§
Appellee.	§

Submitted: March 7, 2012

Decided: April 30, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 30th day of April 2012, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In February 2011, the Superior Court convicted the defendant-appellant, Larry Lee (“Lee”), of one count of Robbery in the Second Degree,¹ one count of Conspiracy in the Second Degree,² and one count of Endangering the Welfare of a Child.³ The Superior Court sentenced Lee as

¹ Del. Code Ann. tit. 11, § 831(a)(2) (2007).

² *Id.* at § 512(1).

³ *Id.* at § 1102(a)(4) (Supp. 2010).

a habitual offender to a total period of eight and a half years at Level V incarceration. This is Lee's direct appeal.

(2) Lee's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Lee's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Lee's attorney informed him of the provisions of Rule 26(c) and provided Lee with a copy of the motion to withdraw and accompanying brief. Lee also was informed of his right to supplement his attorney's presentation. He has raised four issues for this Court's consideration. The State has responded to Lee's issues, as well as to the position taken by Lee's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and

determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.⁴

(4) The record at trial fairly establishes the following version of events. On April 6, 2010, around 11 p.m., Genero Cordero (“Cordero”) was home with his family when someone knocked on his door. He saw a young female on his doorstep and opened the door. Three men then forced their way into Cordero’s home. One of the men had a gun. Cordero testified at trial that he recognized one of the men, Lee, as someone whom he knew from attending the Department of Correction’s Boot Camp program in 1998. Lee was not the man with the gun. Cordero did not recognize the other two men. The robbers asked for money, guns and drugs. Cordero told them to take whatever they wanted. One of the men, not Lee, went upstairs and took several pairs of designer sunglasses, jewelry, a cell phone, and money. At one point, Lee asked Cordero if he recognized him. Although he did, Cordero responded that he did not. Cordero testified that Lee then told his accomplices that they were in the wrong house. Lee did not, however, tell his accomplices not to steal anything. The robbers stayed in the house for

⁴ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

about twenty minutes before they left. Cordero's girlfriend then called the police.

(5) In July 2010, Cordero was driving in Wilmington when he saw Lee who motioned for him to pull over. Lee asked Cordero why he had called the police. Lee then told Cordero not to show up in court. That same day, Cordero called police to report the incident. Officers obtained a warrant for Lee's residence. Upon searching, the police found a white Versace sunglass case, which Cordero identified as having been stolen from his house during the earlier robbery. Cordero identified Lee during a photo line-up and also identified him at trial.

(6) Lee raises four issues for this Court's consideration on appeal. We consider these claims in order. First, Lee contends that the Superior Court erred in finding him guilty of Robbery in the Second Degree, as a lesser included offense of Robbery in the First Degree, because neither party requested the trial court to consider lesser included offenses.⁵ The record, however, belies this claim. The trial transcript reflects that, during closing arguments, both the prosecutor and defense counsel argued in favor of the trial judge considering Robbery in the Second Degree as a lesser included

⁵ See *Ramsey v. State*, 996 A.2d 782 (Del. 2010) (holding that the "party autonomy" rule places the burden on the parties to decide whether to request the judge to consider lesser included offenses during a bench trial).

offense to Robbery in the First Degree. Accordingly, there is no factual basis to support Lee's first claim.

(7) Next, Lee argues that the trial court erred by not finding that he had renounced his participation in the robbery when he attempted to convince his codefendants that they were in the wrong house and should leave. The affirmative defense of renunciation requires a defendant to establish a complete and voluntary abandonment of the criminal purpose.⁶ Under the circumstances of this case, we find no error in the Superior Court's failure to find that Lee had renounced his crimes. It was entirely within the judge's discretion to credit Cordero's testimony that Lee was directly involved in breaking into the house, remaining in the house and not actively interceding while his coconspirators pulled a weapon and stole items, in leaving the house with his coconspirators, and in sharing in the proceeds of the robbery. Accordingly, we reject Lee's second claim on appeal.

(8) Lee's third contention is that the trial court erred by finding him guilty of Robbery in the Second Degree. Lee contends that because the Superior Court found him not guilty of Robbery in the First Degree, the

⁶ See Del. Code Ann. tit. 11, § 541(b) (2007) (recognizing the defense of renunciation if the accused avoided the commission of the crime attempted by abandoning the criminal effort or by taking further affirmative steps to prevent the commission of the crime attempted).

Superior Court then could not find him guilty of Robbery in the Second Degree because both crimes have the same *mens rea*. We disagree with Lee's argument. In explaining the verdict, the trial judge specifically stated that the evidence established that Lee went to Cordero's home with his coconspirators with the intent to forcibly compel Cordero to deliver up property.⁷ The trial judge further stated that she found Lee not guilty of Robbery in the First Degree because she found insufficient evidence to prove that Lee knew his conspirators were armed and intended to use a weapon.⁸ The Superior Court clearly found that Lee possessed the requisite *mens rea* to commit Robbery in the Second Degree. Thus, we find no merit to Lee's third claim.

(9) Lee's final argument is that the evidence was insufficient to prove his guilt as an accomplice beyond a reasonable doubt. Lee contends that, under 11 Del. C. §§ 273(2), (3), he should have been exempt from liability as an accomplice. Section 273(2) provides that a person is not liable for an offense committed by another if the "offense is so defined that the person's conduct is inevitably incident to its commission."⁹ Lee does not suggest how this subsection applies to a charge of Robbery in the Second

⁷ See DEL. CODE ANN. tit. 11, § 831(a)(2) (2007).

⁸ *Id.* § 832(a)(2).

⁹ *Id.* § 273(2).

Degree, and we conclude that it simply does not. Section 273(3)(b) provides, in relevant part, that an accomplice will not be held liable if the accomplice terminates complicity “prior to the commission of the offense and ... makes a proper effort to prevent the commission of the offense.”¹⁰ For the reasons previously stated, we find that this subsection does not exempt Lee from liability as an accomplice because the evidence established that he did not terminate his complicity prior to the commission of the offenses. Accordingly, we reject this claim on appeal.

(10) This Court has reviewed the record carefully and has concluded that Lee’s appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Lee’s counsel has made a conscientious effort to examine the record and the law and has properly determined that Lee could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland
Justice

¹⁰ *Id.* at § 273(3)(a).